

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





ORIGINAL

74-1791

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

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GAJON BAR & GRILL, INC. and JAMES FRANCIONE

*Plaintiffs-Appellees,*

*against*

EUGENE KELLY, individually and in his capacity as Police  
Commissioner of the County of Suffolk, State of New York,

*Defendant,*

*and*

PAUL J. FITZPATRICK, individually and as Supervisor of the  
Town of Smithtown;

VINCENT J. TRIMARCO, individually and as Town Attorney  
of the Town of Smithtown,

*Defendants-Appellants,*

*and*

ROBERT HOSS, individually and as a member of the Suffolk  
County Police Department; and EMIL ORTOLANI, indi-  
vidually and as a member of the Suffolk Police Department,

*Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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JOINT APPENDIX

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HOWARD E. PACHMAN

*Special Counsel to Defendants-Appellants*

*Paul J. Fitzpatrick and Vincent J.*  
*Trimarco*

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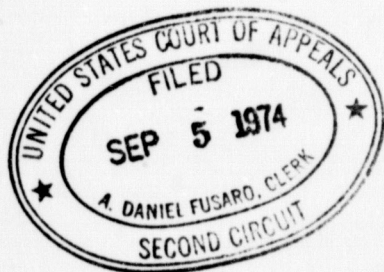
BELLI, SARISOHN, CREDITOR, CARNER,

THIERMAN & STEINDLER,

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PAGINATION AS IN ORIGINAL COPY



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**Docket Entries.**

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF NEW YORK**

**74C 476**

**GAJON BAR & GRILL INC.**

**vs.**

**EUGENE KELLY, et al**

DATE	FILINGS—PROCEEDINGS
3/26/74	Complaint filed. Summons issued.
3-28-74	By BRUCHHAUSEN, J.—Order to show cause dtd 3-26-74 for an order to enjoin defts from enforcing local law 1-1973 ret 4-9-74 at 10 A.M. with proof of service filed.
3-29-74	Summons returned and filed/executed.
4-8-74	Affidavit and memorandum of law in opposition to order to show cause filed.
4-9-74	Before BRUCHHAUSEN, J.—Case called for hearing on order to show cause. Submitted. Decision reserved.
4/12/74	Application for convening of three-judge court filed.
4/19/74	ANSWER of defts P. Fitzpatrick & V. Trimarco filed.
5-2-74	Amended answer of defts Fitzpatrick & Trimarco filed.



*Docket Entries.*

- 5/2/74 By BRUCHHAUSEN, J.—Memorandum and order  
dtd 5/2/74 enjoining defts from prosecuting  
the plttfs for any violation of Local Law 1-1973  
of Town of Smithtown, or in any way interfer-  
ing with the activities which may be prohibited  
by said law filed. (Copy or order forwarded  
to attys)
- 5-30-74 Notice of appeal filed. Duplicate mailed to C  
of A. jn
- 5-3-74 Answer of defts Kelly, Hoss & Ortolani filed.
- 7-5-74 Record on appeal certified and handed to Howard  
D. Pachman for delivery to C of A

**Order to Show Cause.**

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

---

GAJON BAR & GRILL INC. (a body corporate of the State of New York) 309 Smithtown Boulevard, Lake Ronkonkoma, Long Island, New York,

*and*

JAMES FRANCIONE, 12 Hazel Drive, Smithtown, New York,

Plaintiffs,

*against*

EUGENE KELLY, individually and in his capacity as Police Commissioner of the County of Suffolk, State of New York, Veterans Memorial Highway, Hauppauge, New York,

*and*

PAUL J. FITZPATRICK, individually and as Supervisor of the Town of Smithtown, Town Hall, Main Street, Smithtown, New York,

*and*

VINCENT J. TRIMARCO, individually and as Town Attorney of the Town of Smithtown, 1040 West Jericho Turnpike, Smithtown, New York,

*and*

ROBERT HOSS, individually and as a member of the Suffolk County Police Department, c/o Fourth Precinct, Veterans Memorial Highway, Hauppauge, New York,

*and*

EMIL ORTOLANI, individually and as a member of the Suffolk County Police Department, c/o Fourth Precinct, Veterans Memorial Highway, Hauppauge, New York,

Defendants, Jointly and Severally.

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UPON THE COMPLAINT HEREIN, and the Affidavit of John Klein, duly sworn to on March 25, 1974, the Affidavit of James Francione, sworn to on March 25, 1974, the Motion



*Order to Show Cause.*

of Belli, Sarisohn, Creditor, Carner, Thierman & Steindler, by Floyd Sarisohn, of Counsel, and the Memorandum in support thereof, it is

ORDERED, that defendants show cause before this Court in Courtroom 2, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 4th day of April, 1974, at 10 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard,

Why an Order should not be made herein enjoining, pursuant to Rule 65, Federal Rules of Civil Procedure, the defendants, Eugene Kelly, Paul J. Fitzpatrick, Vincent J. Trimarco, Esq., their agents, servants, employees and persons acting under their control or authority in active concert or participation from in any way enforcing Local Law No. 1—1973 of the Town of Smithtown, as against plaintiffs, or in any way interfering with their activities with respect to the Red Velvet Lounge, operated by plaintiff, Gajon Bar & Grill Inc., 309 Smithtown Boulevard, Lake Ronkonkoma, New York, which may be prohibited by the text of said Local Law, pending the hearing and determination of plaintiffs' complaint for Permanent Injunction, Declaratory Judgment and damages, and

Why an Order should not be made herein enjoining, pursuant to Rule 65, Federal Rules of Civil Procedure, the defendants, Eugene Kelly, Paul J. Fitzpatrick and Vincent J. Trimarco, Esq., their agents, servants, employees and all persons acting under their control or authority in active concert or participation from in any way prosecuting the plaintiffs or their agents, servants or employees for any violation of Local Law No. 1—1973 of the Town of Smithtown, which occurred at the Red Velvet Lounge, operated by plaintiff, Gajon Bar & Grill Inc., at 309 Smithtown Boulevard, Lake Ronkonkoma, New York, pending a hearing and determination of plaintiffs' complaint for



*Order to Show Cause.*

Permanent Injunction, Declaratory Judgment and damages; and it is further

ORDERED, that pending a hearing on this motion, defendants, Eugene Kelly, Paul J. Fitzpatrick and Vincent J. Trimarco, Esq., their agents, servants, employees and all persons acting under their control or authority in active concert or participation, be and they are hereby enjoined from in any way enforcing Local Law No. 1—1973 of the Town of Smithtown, or prosecuting the plaintiffs, their agents, servants or employees under same with respect to the Red Velvet Lounge, located at 309 Smithtown Boulevard, Lake Ronkonkoma, New York, operated by Gajon Bar & Grill Inc.; and it is further

ORDERED, that personal service of a copy of this Order, and the papers upon which the same is granted, and the summons and complaint upon the defendants, Eugene Kelly, Paul J. Fitzpatrick and Vincent J. Trimarco, Esq., before April 29, 1974, by 5:00 P.M., shall be deemed good and sufficient service.

Dated: Brooklyn, New York, March 26, 1974.

WALTER BRUCKHAUSEN  
United States District Judge

**Application for Order to Show Cause, Temporary  
Injunction and Motion for Preliminary Injunction  
in Support of Order to Show Cause.**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

[S A M E T I T L E]

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TO THE HONORABLE, THE JUDGE OF SAID COURT

Plaintiffs, by and through their attorneys, Belli, Sari-  
sohn, Creditor, Carner, Thierman & Steindler, complaining  
of the Defendants, moves this Court under the provisions  
of *Rule 65 of the Federal Rules of Civil Procedure* for a  
temporary injunction, and for a preliminary injunction  
enjoining Defendants, *Eugene Kelly, Vincent Trimarco*  
and *Paul J. Fitzpatrick* and their agents, servants, em-  
ployees and attorneys, and each of them, and all other  
persons under their control or authority in active concert  
or participation with them, from continuing the following  
unconstitutional and unlawful acts, to wit:

- a) Enforcing Local Law Number 1—1973 of the Town  
of Smithtown, as against Plaintiffs or their agents,  
servants or employees, or in any way interfering with  
their activities which may be prohibited by the text of  
said Local Law pending the hearing and determination  
of Plaintiffs' complaint for permanent injunction; de-  
claratory judgment and damages.
- b) Prosecuting the Plaintiffs or their agents, servants  
or employees for any violation of Local Law Number  
1—1973 of the Town of Smithtown, pending the hear-  
ing and determination of Plaintiffs' complaint for  
permanent injunction; declaratory judgment and dam-  
ages.



*Application for Order to Show Cause, Temporary  
Injunction and Motion for Preliminary Injunction.*

If Defendants, their agents, servants, employees and attorneys are not so ordered, immediate irreparable harm in the nature of deprivation of liberty, detention, loss of livelihood, loss of business, chilling of the free exercise and deprivation of rights secured to Plaintiffs under the First Amendment of the United States Constitution and under the Fourth, Fifth, Sixth and Fourteenth Amendments to said Constitution as more particularly described in the Complaint and Exhibit filed in these proceedings. Further, the danger of irreparable harm is evident by the broad terms of the Local Law covering all live entertainment, the obvious discrimination on the basis of sex, and the discrimination against one art form and the specific exemption from the Local Law of others. Further irreparable harm is demonstrated by the allegations of Plaintiffs showing the repeated arrests, harassment and intent on the part of local governmental authorities to enforce and prosecute persons under color of the Local Law. Further irreparable harm is demonstrated by the allegations of Plaintiffs as to the chilling effect of the Local Law and the enforcement and prosecution thereunder which serves to jeopardize Plaintiffs' business and inhibits the free exercise of Plaintiffs' First Amendment Rights and interferes with the public's right to view and be entertained by topless dancers.

Respectfully submitted,

BELLI, SARISOHN, CREDITOR, CARNER,  
THIERMAN & STEINDLER

BY: s/ FLOYD SARISOHN  
Attorneys for Plaintiffs

**Affidavit of John Klein in Support of Motion.**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

[S A M E T I T L E]

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STATE OF NEW YORK     }  
COUNTY OF SUFFOLK    } ss.:

JOHN KLEIN, being duly sworn, deposes and says:

I am the President of Gajon Bar & Grill Inc. of 309 Smithtown Boulevard, Lake Ronkonkoma, New York, operator and owner of the Red Velvet Lounge.

The Corporation purchased the bar and grill business assets, lease and good will of Sophies Red Velvet Lounge, 309 Smithtown Boulevard, Ronkonkoma, New York, in or about November, 1972.

The business has been falling off of late and has caused serious financial difficulties, and I have been in danger of losing the business.

After noting that business reached a profitable level when topless entertainment has been presented at the premises before and after the present Corporation acquiring the business, I hired James Francione as manager in order to manage the business so as to prevent its failure. Without the entertainment which my manager has presented and intends to continue to present, the present business will fail.

Business at the location improves greatly when entertainment in the form of topless dancers is presented and falls drastically to below profitable levels when they cannot be employed.



*Affidavit of John Klein.*

Our dancers are employed in that capacity only. They are not waitresses and perform no other function. They dance on a stage and are well received by our clientele.

Only adults are permitted to enter the premises. The dancing is performed in a decorous manner and a sign is prominently displayed at the entrance indicating to the public that topless entertainment is offered.

The substantial curtailment of business resulting from compliance with the Local Law is likely to result in a failure of the business.

I have been advised by my attorney that the Local Law violates the First and Fourteenth Amendments in that it is vague and overbroad, discriminatory and establishes a censorship of expression presumptively protected by said First Amendment.

As a result of the imminence of prosecution and the reported statements of the Supervisor of the Town of Smithtown that he does not intend to permit topless entertainment in the Town of Smithtown, I am fearful of prosecution under the Local Law and have been forced to cease the use of female topless dancers. The Local Law has, therefore, chilled the exercise by the Plaintiffs and their performers of their First Amendment rights. Each day that the Local Law remains in effect results in substantial monetary losses to both Plaintiffs and results in deprivation, to our clientele of the right to view, and our right to present, the constitutionally protected expression formerly presented and intended to be presented in the premises. I am in no position to retain any present manager or any manager unless business can be maintained at the level which occurs when topless dancers are presented. The Corporation and I are suffering irreparable injury and face the imminent loss of business by reason of the harassment and chill placed upon the exercise of our First Amendment rights by the Local Law. We respect-

10a

*Affidavit of John Klein.*

fully request that this chill and harassment be removed  
by the granting of the relief sought herein.

No prior application has been made for the relief sought  
herein.

.....  
s/ JOHN KLEIN

(Sworn to March 25, 1974.)



**Affidavit of James Francione in Support of Motion.**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

[S A M E T I T L E]

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STATE OF NEW YORK }  
COUNTY OF SUFFOLK } ss.:

JAMES FRANCIONE being duly sworn, deposes and says:

I am one of the Plaintiffs herein and the manager of the Red Velvet Lounge operated by Gajon Bar & Grill Corp. of 309 Smithtown Boulevard, Lake Ronkonkoma, County of Suffolk, State of New York, the corporate Plaintiff herein.

I was hired in or about March, 1974, as said manager.

I had been manager of Sophies Red Velvet Lounge at the same location prior to its sale to the present corporation in or about November, 1972.

Prior to the sale of Sophies Red Velvet Lounge to the present owner and on May 2, 1972, and May 23, 1972, I was arrested by Suffolk County Police with two others for a violation of Local Law 2—1970 of the Town of Smithtown, County of Suffolk, State of New York.

On January 3, 1973, the charges were dismissed on the ground that the local law was adopted prior to the date enabling legislation of the State of New York permitting towns to adopt local laws covering the subject became effective (District Court County of Suffolk, CECR 3140-A&B—1972, SMO 115 A&B—1972, Lama, J.).

Thereafter, on January 23, 1973, the Town of Smithtown, enacted Local Law No. 1—1973, which is almost identical to Local Law No. 2—1970, in order to reinstate the prior Local Law.

*Affidavit of James Francione.*

On December 1, 1971, a dancer, Mary Morira, an employee, Eugenie Hergott and Anthony Monaco, an alleged manager, were arrested by Suffolk County Police and charged with a violation of Local Law No. 2—1970, of the Town of Smithtown at the same location while the premises were under the ownership of Sophies Red Velvet Lounge. The charges were dismissed as to Hergott and Monaco but Mary Moreira was convicted under Local Law No. 2—1970, on March 2, 1972. (District Court, Suffolk Co. 10,635 A, B, C Newmark, J.)

On March 16, 1974, at about 1:30 a.m. and again at about 1:30 p.m. of that day, I was arrested with two different dancers and charged with a violation of Local Law 1—1973 of the Town of Smithtown, and the matters have been placed upon the ordinance violation calendar of the District Court, County of Suffolk, for March 23, 1974. Bail was set at Twenty-Five Dollars on the first arrest and One Hundred Dollars on the second arrest.

On March 19, 1974, I was arrested by Suffolk County Police along with one Peter LaFurge, also known as Barbara LaFurge, a dancer, for violation of Local Law No. 1—1973 of the Town of Smithtown, but we were later released by the Police after they determined that Peter LaFurge, also known as Barbara LaFurge, is a male.

After the arrest on March 19, 1974, Paul J. Fitzpatrick, Supervisor of the Town of Smithtown is quoted in The Long Island Press of March 20, 1974, as having stated, "We have no interest in being the topless capital of the County, State or the Country . . ." and was similarly quoted in Newsday of the same date.

The Smithtown News, March 21, 1974, with reference to the incidents reports the comments of Supervisor Fitzpatrick as follows:

"The arrest was obviously (stated [Sic] as) an attempt to publicize the lounge and to embarrass those



*Affidavit of James Francione.*

who are responsible for upholding the Town's Laws. The Supervisor went on to say that he was pleased by the arrests and the fact that the Fourth Precinct had moved in on the lounge 'with dispatch.' 'We are not interested in this type of entertainment in Smithtown; and if the proprietor wishes to provide it, then he should go someplace else and set up shop,' said Fitzpatrick."

I was hired in March of this year due to the financial difficulties which the present corporation found itself in. It has been my experience at the present location under the prior owners and under the present owner that business improves drastically when entertainment in the form of topless dancers is provided.

When dancers have been employed, they act in the capacity of entertainers only and perform no other function. This dancing takes place upon a stage and offer pleasing and enlightening entertainment.

Only adults are permitted upon the premises. The dancing has been performed in a decorous manner and never offends our patrons.

A sign is prominently displayed at the entrance of the premises indicating that topless entertainment is offered. I have been advised by my attorney that the Local Law violates the First and Fourteenth Amendments in that it is vague, overbroad, discriminatory and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of the fact that our dancers and I have been previously arrested five times for violation of the present or previous Local Law, the public statements attributed to the Supervisor of the Town of Smithtown on March 19, 1974, and his previously reported statements after the predecessor Local Law was struck down, to the effect that

*Affidavit of James Francione.*

he intends to stop topless entertainment in the Town of Smithtown, and the fact that the latest three arrests occurred subsequent to the decision of this Court in *Salem Inn, Inc. v. Frank* 364 F Supp. 2d 478 USEDC § 73-C-1200 decided Sept. 6, 1973, which issued an injunction enjoining the prosecution of the Plaintiffs in that action for violation of a local law in the Town of North Hempstead, County of Suffolk, which is similar to the Local Law in the instant case, and the real fear of continued prosecution under the Local Law, I cannot present such entertainment as has been done in the past and as I intend, in order to salvage a business now facing financial difficulties.

The Local Law has, therefore, chilled the exercise by Plaintiffs and their dancers of their First Amendment rights. Each day that the Local Law remains in effect, results in substantial monetary losses to both Plaintiffs and results in deprivation to our clientele of the right to view, and our right to present, the constitutionally protected expression formerly presented and intended to be presented in the premises. My employer is in no financial position to continue my employment unless I can maintain the business at the level which occurs which such entertainment is presented. We are suffering irreparable injury by reason of the harassment and chill placed upon the exercise of our First Amendment rights by the Local Law. We respectfully request that this chill and harassment be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

s/ JAMES FRANCIONE

(Sworn to March 25, 1974.)



**Summons in Support of Motion.**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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[SAME TITLE]

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To: VINCENT J. TRIMARCO, Town Attorney  
1040 West Jericho Turnpike  
Smithtown, New York

You are hereby summoned and required to serve upon Belli, Sarisohn, Creditor, Carner, Thierman & Steindler, Plaintiffs Attorneys whose address is 1020 East Jericho Turnpike, Commack, New York, P.O. Box 292, 11725, an Answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the date of service. If you fail to do so, Judgment by Default will be taken against you for the relief demanded in the Complaint.

SEAL

LEWIS ORGEL  
Clerk of the Court

MARYANN BURNS  
Deputy Clerk

SEAL

Dated: March 25, 1974.

This Summons is issued pursuant to Rule 4 of the Federal Rules of Procedure.

**Complaint in Support of Motion.**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

[S A M E T I T L E]

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COUNT I

1. This is an action for injunctive and declaratory relief pursuant to Title 28, United States Code, Section 2201 and arises under Title 42, United States Code, Section 1983. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1343.

a) The matter in controversy arises under the Constitution and Laws of the United States of America;

b) This is an action to redress the deprivation, under color of law, of the rights, privileges and immunities secured to plaintiffs by the Constitution of the United States of America;

c) This is an action to secure equitable relief for the protection of plaintiff's civil rights;

d) This is an action to have declared unconstitutional and to enjoin the enforcement, operation, execution and prosecution of Local Law No. 1—1973 of the Town of Smithtown, County of Suffolk, State of New York.

PARTIES

2. Plaintiff, Gajon Bar & Grill Inc., is a domestic corporation, incorporated under the laws of the State of New York and is the operator of the Red Velvet Lounge, located at 309 Smithtown Boulevard, Lake Ronkonkoma,



*Complaint.*

Town of Smithtown, County of Suffolk, State of New York.

3. Plaintiff, James Francione, is an individual employed by Gajon Bar & Grill Inc., as manager of the Red Velvet Lounge, located at 309 Smithtown Boulevard, Lake Ronkonkoma, Town of Smithtown, County of Suffolk, State of New York.

4. Defendant, Eugene Kelly, is the Police Commissioner of the County of Suffolk, State of New York, and as such is responsible for the enforcement of the laws and ordinances of the Town of Smithtown, County of Suffolk, State of New York, within the Town of Smithtown.

5. Like defendant, Vincent J. Trimarco, is the Town Attorney for the Town of Smithtown, County of Suffolk, State of New York and as such is in charge of administering and enforcing the laws and ordinances of the Town of Smithtown.

6. Defendant, Robert Hoss, is a resident of the within Judicial District and is a Police Officer employed by the County of Suffolk State of New York, and is under the direction, supervision and control of defendant Kelly.

7. Defendant, Emil Ortolani, is a resident of the within Judicial District and is a Police Officer employed by the County of Suffolk, State of New York, and is under the direction, supervision and control of defendant Kelly.

8. Defendant, Paul J. Fitzpatrick, is the Supervisor of the Town of Smithtown State of New York, and as such is responsible for the administration and prosecution of the laws, rules and ordinances of the Town of Smithtown and has a vote upon the Town Board on legislative matters.

*Complaint.*

## LOCAL LAW IN ISSUE

9. Local Law No. 1—1973 of the Town of Smithtown (hereinafter referred to as the Law), the full text of which is annexed hereto and made a part hereof as Exhibit A, makes it unlawful for a person who directs, gives, manages, participates in or prepares, any live public show wherein a female appears with her breasts below the top of the areola not covered by an opaque covering. The law also makes it unlawful for a female to appear in a public place clothed in such a manner that her breast below the top of the areola is not covered with an opaque covering. Any person who violates the law is punishable by a fine not to exceed \$250.00 or imprisonment for a period not to exceed fifteen (15) days, or both.

## GROUNDS FOR RELIEF

10. The corporate plaintiff is the lessee and operator of premises open to the public within the jurisdiction of this Court, in which, from time to time, female dancers with uncovered breasts have been providing entertainment for adult patrons. The plaintiffs intend and desire to provide such entertainment at the premises on a regular basis. This entertainment by female dancers is expression presumptively protected under the First Amendment of the United States Constitution.

11. At all times relevant hereto, defendants Eugene Kelly and Vincent J. Trimarco, their agents, servants, employees and/or attorneys, Robert Hoss, Emil Ortolani and Paul J. Fitzpatrick, separately and in concert, acting under color and pretense of law, to wit: under color of statutes, ordinances, local laws, regulations, customs and usage of the Town of Smithtown, and more particularly



*Complaint.*

Local Law No. 1—1973 of the Town of Smithtown, County of Suffolk, State of New York, have deprived plaintiffs, their agents, servants and employees, of rights, privileges and immunities secured to them by the First and Fourteenth Amendments to the Constitution of the United States of America.

12. The corporate plaintiff has invested substantial sums of money in its bar and has developed a large following among adult members of the community, who desire to be entertained by topless dancers.

13. The corporate plaintiff's predecessor and the plaintiff, James Francione, have from time to time at the present location presented topless dancing entertainment.

14. On December 1, 1971 a dancer and two employees of the predecessor of the corporate plaintiff were arrested by Suffolk County Police at the same premises for a violation of Local Law No. 2—1970 of the Town of Smithtown. Said Local Law being essentially the same as the present Law. After trial, the dancer was convicted and the two employees acquitted.

15. On May 2, 1972 and May 23, 1972 plaintiff Francione and two separate individuals were arrested by Suffolk County Police for violations of the aforesaid Local Law No. 2—1970. The issues were presented for trial on agreed issues of fact and the charges were dismissed on January 3, 1973 on the ground that the Town of Smithtown had enacted Local Law No. 2—1970 prior to the effective date of the enabling legislation of the State of New York.

16. Immediately upon the voiding of Local Law No. 2—1970, the Town of Smithtown adopted the present law which is essentially the same as the previously voided law.

*Complaint.*

17. On March 16, 1974 the plaintiff Francione and Leslie Brook Bank were arrested by defendant Robert Hoss, and plaintiff Francione and Beth Anne Magazzo were arrested by Suffolk County Police for a violation of the present law and were charged with violations of the said Law by the respective Police Officers. Plaintiff Francione and the others are to be arraigned in the District Court of the County of Suffolk, State of New York, on March 28, 1974.

18. On March 19, 1974 plaintiff Francione and one Peter La Furge, also known as Barbara La Furge, a dancer, were arrested by Suffolk County Police for a violation of Local Law No. 1—1973, but were later released and not charged when the police determined that Peter La Furge, also known as Barbara La Furge, is a male.

19. Topless dancing entertainment has been presented at the subject premises from time to time and has provided the difference between business failure and a reasonably profitable enterprise. Since the arrests of March 16th and 19th, 1974, plaintiffs and their dancers, under fear and threat of arrest and prosecution, have ceased to provide female topless dancing entertainment, thereby succumbing to the chill placed upon the exercise of their First Amendment rights.

20. This cessation of female topless dancing entertainment has resulted in a diminution of plaintiff's business and threatens a further drastic diminution of plaintiff's business, since the clientele of the establishment have become accustomed to female topless entertainment and many adults in the community desire to observe such entertainment and patronize the plaintiff's establishment with the expectation of being entertained thereby.



*Complaint.*

21. Plaintiffs have attempted to obtain entertainment similar in nature to female topless dancers, in order to comply with the law, however, such entertainers are extremely rare and are difficult to obtain and impossible to obtain in sufficient number to present such entertainment on a regular basis.

22. The dancers which perform in plaintiff's bar are employed only as topless dancers. They are not waitresses and perform no other function on the premises. They dance on the stage and appear only on the stage in topless attire and are well received by patrons. Patrons are not permitted on the stage with the performers.

23. Only adults are permitted to enter the bar. The dancing is performed in a decorous manner and never offends any of the patrons.

24. A conspicuous sign at the entrance clearly advises prospective patrons of the nature of the entertainment offered in the premises and thereby deters adults who would be offended by such entertainment from entering the premises.

25. Compliance with the law has resulted, and will continue to result, in substantial curtailment of plaintiff's business and seriously threatens the closing of the business.

26. Compliance with the law has chilled the exercise by plaintiffs and their female dancers of their First Amendment rights.

27. The Law deprives the patrons of the plaintiffs of the right to view constitutionally protected expression.

28. The law deprives the plaintiffs of the right to present constitutionally protected expression.

*Complaint.*

29. The law discriminates against women on the basis of sex and denies equal protection of the law to all citizens.

30. The Law on its face and applied to the exercise of First Amendment rights is so discriminatory, vague and overbroad and devoid of objective guidelines or legitimate municipal concern or authority as to restrain and chill the exercise of such rights in violation of the First and Fourteenth Amendments, in that it forbids the exhibition of non obscene expression presumptively protected by the First Amendment and discriminates against women on the basis of sex.

31. The Law as applied bears no rational relationship to a valid governmental purpose and, as such, is violative of the Fourteenth Amendment.

32. The Law as applied has its sole purpose suppression and, as such, is violative of the Fourteenth Amendment.

33. The Law is causing plaintiffs great and immediate irreparable harm and plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand:

A) A declaratory judgment that Local Law No. 1—1973 of the Town of Smithtown, New York, is unconstitutionally violative of the First and Fourteenth Amendments to the United States Constitution on its face and as applied.

B) A permanent injunction prohibiting the defendants, their agents, servants, employees and anyone acting under their or succeeding to their positions, from in any way enforcing Local Law No. 1—1973 of the Town of Smithtown, New York, with respect to plaintiff's premises where enter-



*Complaint.*

tainment is provided by dancers with breasts not covered with a fully opaque covering.

C) An injunction enjoining defendants and/or their employees and/or persons acting under their direction and/or control from continuing the prosecution of plaintiff, James Francione, and plaintiff's employees, Leslie Brook Bank and Beth Anne Magazzo.

D) The costs of this action.

E) Such other, further and different relief as to the Court may seem just and proper in the premises.

## COUNT II

1. Plaintiffs reallege and adopt by reference paragraphs 1-33 inclusive of Count I of this complaint.

2. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Sections 1331 and 1343; and Title 42 USC Sections 1985 and 1986. The matter in controversy exceeds \$10,000.00 exclusive of interest and costs.

3. In doing the acts and things complained of, defendants individually and as conspirators, were engaged in a scheme and conspiracy designed and intended to deny and deprive plaintiffs of their rights guaranteed to them under the constitution and laws of the United States and particularly those herein enumerated.

4. Plaintiffs have been subjected, because of the acts recited herein, to the deprivation by defendants, under color of law, and of the customs and usages of the State of New York and the Town of Smithtown, of rights, privileges and immunities secured to him by the Constitution and the Laws of the United States and particularly their

*Complaint.*

rights of speech and expression guaranteed under the First Amendment to the United States Constitution, their rights to security of person and freedom from arrest, except upon probable cause, supported by oath or affirmation, guaranteed by the Fourth Amendment to said Constitution, their right to be informed of the true nature and cause of the accusation guaranteed by the Sixth Amendment to said Constitution, their rights not to be deprived of liberty without due process of law, guaranteed by the Fifth and Fourteenth Amendments to said Constitution and their right to the equal protection of the laws guaranteed under the Fourteenth Amendment to said Constitution.

5. The charge of violation of Local Law 1—1973 of the Town of Smithtown, was a mere pretext to provide color for the arrest and punishment of plaintiff, James Francione, for exercising his lawful and constitutional right of expression and to further prevent such expression in the future.

6. As a direct result of the acts of defendants hereinabove complained of, plaintiff, James Francione, was harassed, deprived of liberty for a substantial period of time, suffered much anxiety and distress and lost much time from the pursuit of his occupation and was and still is required to spend substantial sums of money and of time in defending himself from the charges against him.

WHEREFORE, plaintiff, James Francione, claims damages of the defendants in the amount of \$75,000.00.

## COUNT III

1. Plaintiff, Gajon Bar & Grill Inc., realleges and adopts by reference paragraphs 1-33 inclusive of Count I of this



*Complaint.*

complaint and paragraphs 1-6 inclusive of Count II of this complaint.

2. The acts of defendants complained of herein have placed the plaintiffs in fear of the exercise of their rights guaranteed under the First Amendment and have inhibited and prevented plaintiff, Gajon Bar & Grill Inc. from operating its business in a manner which will prevent the loss of the business.

3. Defendants' actions have caused extreme financial difficulties and loss of business and further serves to inhibit customers through fear of police raids.

WHEREFORE, plaintiff, Gajon Bar & Grill Inc., claims damages of the defendants in the amount of \$75,000.00.

Yours, etc.,

BELLI, SARISOHN, CREDITOR,  
CARNER, THIERMAN & STEINDLER  
Attorneys for Plaintiffs

(Verified.)

26a

**Exhibit A, Annexed to Complaint.**

**Local Law No. 1—1973**

**(photoprint)**

**(For convenience of Court and Counsel this Exhibit is  
bound in on the opposite page).**



# **PUBLIC NOTICE**

NOTICE IS HEREBY GIVEN, that the Town Board of the Town of Smithtown, Suffolk County, New York met at the Town Hall, Main Street, Smithtown, New York on the 23rd day of January, 1973 at 1:30 P.M., time then in effect and duly adopted Proposed Local Law No. 1 - 1973 for the regulation of entertainment in public places.

## **PROPOSED LOCAL LAW**

**NO. 1 - 1973**

## **REGULATION OF ENTERTAINMENT IN PUBLIC PLACES**

### **CLOTHING REQUIREMENTS**

It shall be unlawful for any female to appear in public clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering. Any person shall be guilty of violating this section who, in any capacity, knowingly directs, gives, manages, participates in, prepares or presents, or who employs others so to do any live public show in which a female appears clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering.

### **DEFINITIONS**

**IN PUBLIC** - Means any place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place accessible to the public to gather or pass to and from.

**PUBLIC SHOW** - Means any entertainment, or exhibition ad-

vertised or in other fashion held out to be accessible to the public, whether or not an admission or other charge is levied or collected; an entertainment or exhibition shall be deemed a public show although access to it is only granted to members of a club or other association, when membership in such organization is obtained upon payment of an admission price or contribution or token dues or other small fee, and the organization in fact exists primarily for sponsoring or arranging admissions to such performances.

**LIVE PUBLIC SHOW** - Means a "public show" in which human actors, dancers, or other performers, employees, or other persons appear in person before spectators or customers. A bona fide drawing, painting, photography, sculpture, or other art class utilizing human models and admitting only participating instructors, students, and models shall not be deemed a live public show.

### **VIOLATIONS AND PENALTIES**

Any person found guilty of violating this ordinance shall be subject to imprisonment not to exceed fifteen (15) days, or a fine to be fixed by the court not to exceed two hundred fifty dollars (\$250.00), or both.

### **EFFECTIVE DATE**

This Local Law shall take effect ten (10) days after adoption. This Local Law supersedes and replaces Local Law #2 of 1970. Dated: January 23rd, 1973

BY ORDER OF THE  
TOWN BOARD OF THE  
TOWN OF SMITHTOWN  
VICTOR T. LISS  
TOWN CLERK 1/25/73

RECEIVED # A

27a





**Affidavit of Patrick A. Sweeney in Opposition  
to Motion.**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

[SAME TITLE]

---

STATE OF NEW YORK }  
COUNTY OF SUFFOLK } ss.:

PATRICK A. SWEENEY, under the penalties of perjury  
affirms the following:

1. That he is an attorney-at-law and is of counsel to  
George W. Percy, Jr., attorney for the defendants Eugene  
Kelley (sued herein as Eugene Kelly), Robert Hoss and  
Emil Ortolani, and as such is familiar with the facts and  
circumstances of the instant case.

2. That he submits this affirmation in opposition to  
plaintiff's motion for a preliminary injunction.

3. That the two officers named in this case, Robert Hoss  
and Emil Ortolani, as police officers and being part of the  
Suffolk County Police Department, by making the arrest  
were merely doing their job and would have been derelict  
in their duties as police officers if they did not make an  
arrest pursuant to the alleged violation of the ordinance  
by the plaintiff, Francione.

4. That it is not the function of the Police Department,  
from its Commissioner to its patrolmen, to question the  
legality or constitutionality of any statute or ordinance,  
but merely to enforce what ordinances or statutes the State  
Legislature or a town legislative body enacts.



*Affidavit of Patrick A. Sweeney.*

5. As to the plaintiff, Francione, this Court should decline to grant a preliminary injunction in that there are two proceedings pending in the State Court as seen by Exhibits "A" and "B" annexed hereto.

6. As to the plaintiff, Gajon Bar & Grill, Inc., while an allegation of immediate irreparable harm in the nature of loss of livelihood and loss of business is made by said plaintiff, it would appear by said plaintiff's own papers that this is not true. In John Klein's affidavit, he states that he acquired the bar and grill in or about November of 1972 and then goes on to state that the business has been falling off of late. By implication, it would appear that he has been able to conduct his business for some time without the topless entertainment and only recently has business begun to diminish. This, of course, is not as a result of the anti-topless ordinance, since he has only in March of 1974 begun to show said entertainment in violation of the ordinance.

In a bar and grill type of business such as the plaintiff's, there certainly can be innumerable factors for the loss of business such as location, type of food served, condition of premises, etc., all of which can contribute to the success or failure of a business.

WHEREFORE, your deponent respectfully requests that the motion of plaintiffs for a preliminary injunction be denied in its entirety and for such other and further relief as this court may deem just and proper.

Dated: Northport, New York, April 5, 1974.

s/ PATRICK A. SWEENEY



**Exhibit A, Annexed to Affidavit of Patrick A.  
Sweeney.**

State Court Proceeding, People vs. Francione.

(Photoprints)

(For convenience of Court and Counsel this Exhibit is  
bound in on the oposite page)

District Court of The County of Suffolk, New York

4th DISTRICT - DOCKET NOS. 2251-4

STATE OF NEW YORK )  
COUNTY OF SUFFOLK ) SS:

VIOLATION INFORMATION

The People of the State  
of New York

(Defendant(s))

-VS- JAMES FRANCIONE

Name (Complainant) ROBERT HOSS PO 1603 6540

of No. FOURTH DISTRICT VETS IRVY HAUPPAUGE

Sqd. # 3

being duly sworn, says that on 3-16-74 at about 1:30 AM

at JASON BAR & GRILL CORP 309 Smithtown Blvd. Smithtown  
Lake Ronkonkoma

County of Suffolk, State of New York, the defendant(s)

James Francione 12 Hazel Dr Smithtown DOB 11-29-36

wrongfully, intentionally, knowingly, ~~publicly~~ committed the offense(s) of:  
Violation Entertainme nt Regulations Chapter 15 Section 15-1 Code of the  
Town of Smithtown.

in that:

Count # 1

Any person shall be guilty of violation this section who, in any capacity, knowingly directs, gives, manages, participates in, prepares or presents, or who employs others so to do any live public show in which a female appears clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering. to wit; the defendant did manage a public place the Jason Bar & Grill Corp, 309 Smithtown Blvd, Lake Ronkonkoma and did employ a female (Leslie Brook Bank) to dance copless in such a manner that both her breasts were fully exposed.

This complaint is based on (personal knowledge) & ~~XXXXXXXXXXXXXXXXXXXX~~, the source being the attached sworn deposition(s) of

dated the attached laboratory report of the Suffolk County Police Department, dated

( ) Warrant Requested \*\*

( ) Criminal Summons Requested

SWORN TO BEFORE ME March 16, 1974

*[Signature]*  
SIGNATURE OF OFFICIAL  
DESK STP

*[Signature]* PO 1603 6540 503  
COMPLAINANT - IF POLICE OFFICER, BARR, SHIELD, GUARD & COMMAND

DCCS - 30006

Exhibit "A"





31a



**Exhibit B, Annexed to Affidavit of Patrick A.  
Sweeney.**

State Court Proceeding, People vs. Francione  
and Magazzo.

(Photoprints)

(For convenience of Court and Counsel this Exhibit is  
bound in on the opposite page)

District Court of The County of Suffolk, New York

1st DISTRICT - DOCKET NOS. 50047-A

VIOLATION COMPLAINT

STATE OF NEW YORK ) ss: James Francione  
COUNTY OF SUFFOLK ) Bethanne Magazzo

Name P.O. Emil Ortolani #1050

of No. 4th Pct. S.C.P.D. Hauppauge N.Y.

being duly sworn, says that on 3-16-74 at about 1330Hrs

at 309 Smithtown Blvd. Lake Ronkonkoma Town of Smithtown

County of Suffolk, State of New York, the defendant(s) James Francione 12 Hazel Dr. Smithtown N.Y. (11-29-36) Bethanne Magazzo 201 N. Utica Ave. N. Massapequa N.Y. (1-7-52)

wrongfully, intentionally, knowingly, ~~not to be used for identification~~ committed the offense(s) of:  
Violation of the Entertainment Law Chapter 15 Section 15-1 of the  
Town of Smithtown N.Y.

Count # 1

in that: it shall be unlawful for any female to appear in a public clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering. Any person shall be guilty of violating this section who, in any capacity, knowingly directs, gives, manages, participates in, prepares or presents, or who employs other so to do any live public show in which a female appears clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering:

TO WIT: said defendant James Francione, while acting in a managerial capacity, did allow and permit one Bethanne Magazzo 201 N. Utica Ave. N. Massapequa N.Y. to perform at Cajon Bar and Grill, also known as Sophie's Lounge 309 Smithtown Blvd. Lake Ronkonkoma N.Y. while her breast were completely exposed to full view of patrons. All being in violation of Chapter 15 Section 15-1 of the Entertainment Law of the Town of Smithtown N.Y.

This complaint is based on (personal knowledge) & (information received), the source being the attached (sworn deposition(s) of \_\_\_\_\_

dated \_\_\_\_\_ ☐ the attached laboratory report of the Suffolk County Police Department, dated \_\_\_\_\_ ☐

SWORN TO BEFORE ME 16<sup>TH</sup> MARCH 1974

Arthur J. Smith  
SIGNATURE OF OFFICIAL ADMINISTERING OATH  
Deputy Sheriff #111, CS/10  
TITLE

P.O. Emil Ortolani  
COMPLAINANT

DCCS-3000

Exhibit "B"





33a



**Affidavit of Paul J. Fitzpatrick in Opposition  
to Motion.**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

[S A M E T I T L E]

---

STATE OF NEW YORK }  
COUNTY OF SUFFOLK } ss.:

PAUL J. FITZPATRICK, being duly sworn, deposes and  
says:

That he is the duly elected Supervisor of the Town of  
Smithtown, a duly incorporated municipality of the State  
of New York, having a population of approximately 120,000  
inhabitants, located in Suffolk County, some fifty miles east  
of New York City.

He was served with a summons and complaint in the  
within action which was accompanied by an Order to Show  
Cause returnable before this Court on Tuesday, April 9,  
1974.

At the regular meeting of the Smithtown Town Board,  
we duly designated and appointed Howard E. Pachman, as  
Special Counsel to represent Defendant, Vincent J. Trim-  
arco, Esq., and your deponent individually and as Town  
Attorney and Supervisor, respectively in the within named  
proceedings.

This affidavit is being submitted in opposition to the re-  
lief requested in the Order to Show Cause dated March 26,  
1974, to wit:

An Order enjoining the defendants, Eugene Kelly,  
Paul J. Fitzpatrick, Vincent J. Trimarco, Esq., their

*Affidavit of Paul J. Fitzpatrick.*

agents, servants, employees and persons acting under their control or authority in active concert or participation from in any way enforcing Local Law No. 1—1973 of the Town of Smithtown, as against plaintiffs, or in any way interfering with their activities with respect to the Red Velvet Lounge, operated by plaintiff, Gajon Bar & Grill Inc., 309 Smithtown Boulevard, Lake Ronkonkoma, New York, which may be prohibited by the text of the said Local Law, pending the hearing and determination of plaintiffs' complaint for permanent injunction, declaratory judgment and damages, and

An Order enjoining the defendants, Eugene Kelly, Paul J. Fitzpatrick and Vincent J. Trimarco, Esq., their agents, servants, employees and all persons acting under their control or authority in active concert or participation from in any way prosecuting the plaintiffs or their agents, servants or employees for any violation of Local Law No. 1—1973 of the Town of Smithtown, which occurred at the Red Velvet Lounge, operated by Plaintiff, Gajon Bar & Grill Inc., at 309 Smithtown Boulevard, Lake Ronkonkoma, New York, pending a hearing and determination of plaintiffs' complaint for permanent injunction, declaratory judgment and damages.

On or about January 23, 1973, the Town Board adopted Local Law No. 1—1973 entitled, Chapter 15 of the Code of the Town of Smithtown—Entertainment Regulations, a local law to regulate entertainment in public places. The law took effect pursuant to its terms ten (10) days after adoption, a copy is attached hereto and made a part hereof as Exhibit "A".

This local ordinance or law was adopted in accordance with and in pursuance of the State sanctioned policy set



*Affidavit of Paul J. Fitzpatrick.*

forth in Laws of the State of New York, to wit: McKinney's Consolidated Laws of New York, Book 39, Penal Law, Article 245, Sections 245.01 (exposure of a female) and 245.02 (permitting the exposure of a female).

In furtherance of the ordinance, to my best knowledge and information, there were no arrests or convictions pursuant to this ordinance until the violation committed by the defendant, Anthony Francione and two (2) female dancers on March 16, 1974 at two separate times, viz: 1:30 a.m. and 1:30 p.m. Attached hereto and made a part hereof, as Exhibit "B" are copies of the information charging the breach of the Local Law:

*Index No. SMO 48-74*

- 1) On March 16th at 1:30 a.m., James Francione did manage a public place, the Gajon Bar & Grill Inc., and did employ a female, Leslie Brook Bank, to dance topless.

*Index No. SMO 47-A.*

- 2) On March 16th at 1:30 p.m., James Francione in his managerial capacity did permit Bethanne Magozzo to perform at Gajon to perform and dance topless.

As a result of these arrests and pending criminal proceedings, the complaining police officers, Ortolani and Hoss are named party defendants as is their superior officer, Eugene Kelly, Police Commissioner of Suffolk County; Vincent J. Trimarco, the Town Attorney is named as the prosecuting attorney and your deponent is named as Supervisor of the Town of Smithtown. The complaint against all these named defendants in their official capacity and more so in their individual capacity is misplaced and ill-founded. All of the named defendants have and are acting

*Affidavit of Paul J. Fitzpatrick.*

solely in their capacity as police officer and/or official governmental or administrative capacities.

I have been advised by counsel that the doctrine of "*respondeat superior*" does not apply and that the Civil Rights Act of 1871 as codified in 42 USC 1983 was not intended to establish liability of municipal corporations and/or the public officers or officials acting in good faith and who are not involved in the conduct or action which caused the alleged deprivation of the complainants' civil rights.

All the defendants herein named have been acting in good faith, to the best of their ability and in the furtherance of their official duties. Their actions were triggered only when a violation of the ordinance had been committed by the acts of the plaintiffs.

The plaintiffs allege in their moving papers that there has been bad faith on the part of the defendants and that plaintiffs have been harassed; these statements belie the facts.

Although Leslie Brook Bank was the topless dancer performing at 1:30 a.m. on March 16, 1974, she was not charged with any violation by Patrolman, Robert Hoss. I have been advised that there were other persons present at the time that the alleged violations took place. They were not charged with any violation of Local Law No. 1—1973, although they were within the prohibition of the law, to wit:

" . . . in any capacity, knowingly, directs, gives, manages, participates in, prepares, or presents, or who employs others. . . ."

It is further somewhat significant that the plaintiff, Gajon Bar & Grill Inc., was not prosecuted under the law since it does not fall within the definition of a person,



*Affidavit of Paul J. Fitzpatrick.*

as set forth in the law, and its claim or fear of prosecution is without foundation.

In Paragraph "21" of the complaint, the plaintiffs allege as follows:

"Plaintiffs have attempted to obtain entertainment similar in nature to female topless dancers, in order to comply with the law, however, such entertainers are extremely rare and are difficult to obtain and impossible to obtain in sufficient number to present such entertainment on a regular basis."

This needs some amplification and may shed some light as to the nature of the conduct which plaintiff feels are appropriate and fall within the ambit of free speech and association.

After the initial arrests set forth in Exhibit "B" there appeared a topless dancer by the stage name of Barbara La Furge. The dancer was arrested, brought to the stationhouse and was revealed for the first time that Barbara La Furge was a male whose true name was Peter La Furge. He claimed to be a trans-sexual. He was taken to a local hospital where it was verified by a hospital physician that he was a male. All charges were dropped since he did not violate the local ordinance. Peter La Furge has been dancing unmolested, uncensored and uncovered. As an appendix, two newspaper stories which appeared in one of the local weekly newspapers having circulation in the Township, on April 4, 1974, set the tone and tenor of the free speech violation claimed.

The plaintiffs seek relief from the local law on the ground that their conduct is protected as expression and falls under the umbrella of free speech and the conduct of defendants has a chilling effect on their commercial activities.

*Affidavit of Paul J. Fitzpatrick.*

The plaintiffs top their plea for injunctive relief with the following paragraph:

"The corporation and I are suffering irreparable injury and face the imminent loss of business by reason of harassment and chill placed upon the exercise of our First Amendment rights by the Local Law."

Their claim that their free speech rights are being trampled is somewhat hard to appreciate since it is bot-tomed solely by their claim that they cannot pursue and profit by their sordid conduct to further their business activities. The exploitation of topless dancing cannot be used to pursue and uphold the lofty and hallowed principles of free speech solely for commercial purposes.

WHEREFORE, it is respectfully requested that the relief sought in the Order to Show Cause be denied and that pursuant to 28 USC 2284 that a three-judge District Court be empaneled pursuant to Section 2281 and that appropriate notice be given to the Attorney General of the State of New York by reason of the fact that Local Law No. 1—1973 was enacted in furtherance of Article 245 of the Penal Law and it is a statute which has statewide jurisdiction and authority.

S/ PAUL J. FITZPATRICK

(Sworn to April 8, 1974.)



40a

**Exhibit A, Annexed to Affidavit of Paul J.  
Fitzpatrick.**

Local Law No. 1—1973

(Photoprints)

(For convenience of Court and Counsel this Exhibit is  
bound in on the opposite page).

Chapter 15

ENTERTAINMENT REGULATIONS

Local Law  
No. 1  
1973

A LOCAL LAW TO REGULATE ENTERTAINMENT IN  
PUBLIC PLACES

- § 15-1. Clothing requirements.
- § 15-2. Definitions.
- § 15-3. Violations and penalties.
- § 15-4. When effective.
- § 15-5. Repealer.

[HISTORY: Adopted Smithtown Town Board 1-23-73 as Local Law No. 1, 1973.<sup>1</sup> Amendments noted where applicable.]

Be it enacted by the Town Board of the Town of Smithtown as follows:

§ 15-1. Clothing requirements.

It shall be unlawful for any female to appear in public clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering. Any person shall be guilty of violating this section who, in any capacity, knowingly directs, gives, manages, participates in, prepares or presents, or who employs others so to do any live public show in which a female appears clothed or costumed in such

<sup>1</sup> Editor's Note: This local law supersedes former Ch. 15, Entertainment Regulations, adopted 8-4-70 as L.L. No. 2, 1970.



a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering.

**§ 15-2. Definitions.**

For the purpose of this local law, the terms used herein are defined as follows:

**IN PUBLIC** — Any place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place accessible to the public to gather or pass to and from.

**LIVE PUBLIC SHOW** — A public show in which human actors, dancers or other performers, employees or other persons appear in person before spectators or customers. A bona fide drawing, painting, photography, sculpture or other art class utilizing human models and admitting only participating instructors, students and models shall not be deemed a "live public show."

**PUBLIC SHOW** — Any entertainment or exhibition advertised or in other fashion held out to be accessible to the public, whether or not an admission or other charge is levied or collected; an entertainment or exhibition shall be deemed a "public show" although access to it is only granted to members of a club or other association when membership in such organization is obtained upon payment of an admission price or contribution or token dues or other small fee, and the organization in fact exists primarily for sponsoring or arranging admissions to such performances.

**§ 15-3. Violations and penalties.**

Any person found guilty of violating this local law shall be subject to imprisonment not to exceed fifteen (15) days, or a fine to be fixed by the court not to exceed two hundred fifty dollars (\$250.), or both.

§ 15-4 ENTERTAINMENT REGULATIONS

§ 15-5

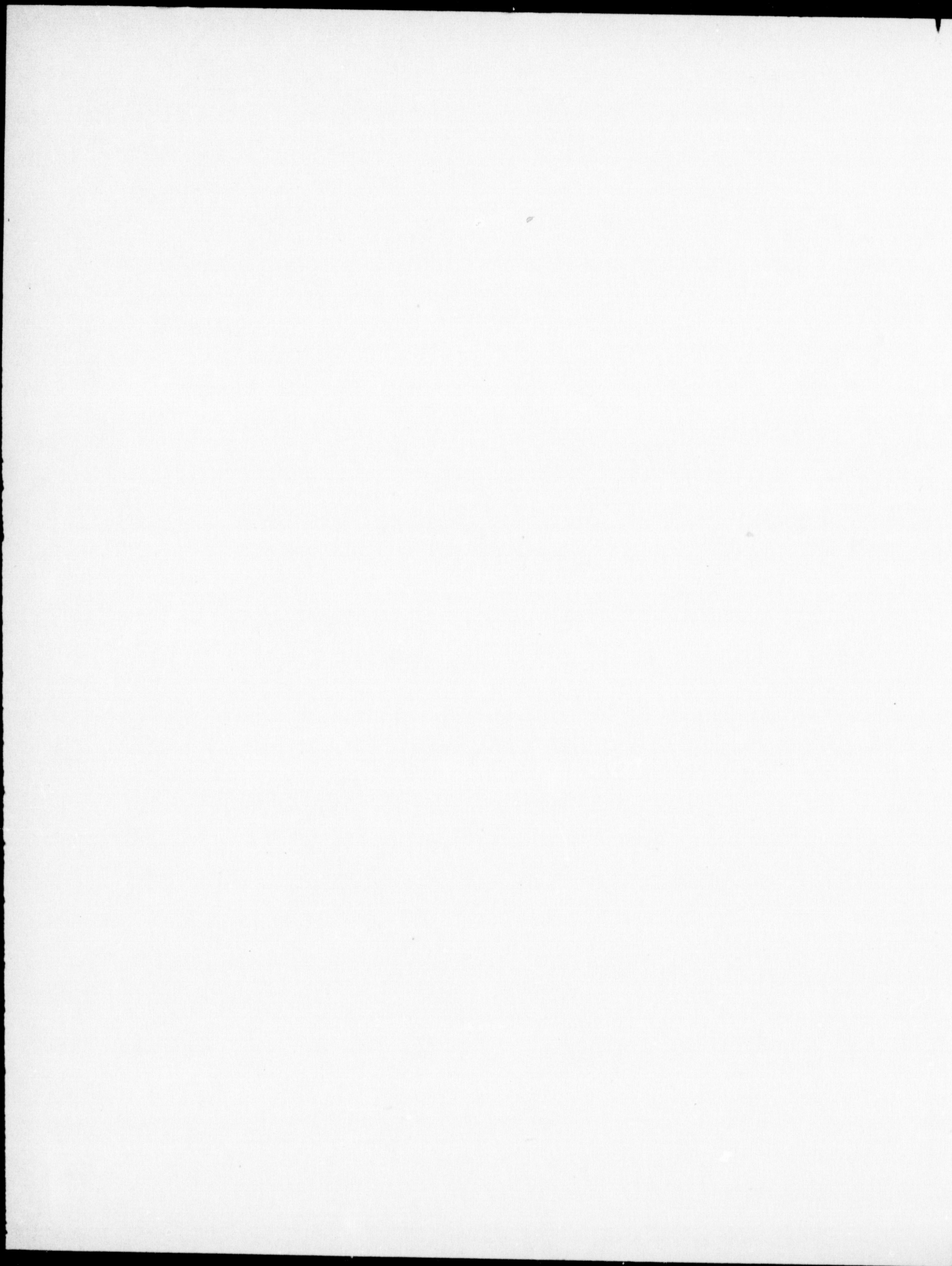
§ 15-4. When effective.

This local law shall take effect ten (10) days after adoption.

§ 15-5. Repealer.

This local law supersedes and replaces Local Law No. 2 of 1970.





41a



**Exhibit B, Annexed to Affidavit of Paul J.  
Fitzpatrick.**

Copies of Two Informations Charging Breach of  
Local Law No. 1—1973.

Identical to Exhibits A and B, Annexed to Affidavit of  
Patrick A. Sweeney. Printed herein at pages 30a to 33a.

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**Appendix, Annexed to Affidavit of Paul J. Fitzpatrick.**

Two newspaper stories, April 4, 1974.

(Photoprints)

(For convenience of Court and Counsel this Exhibit is  
bound in on the opposite page)

# ... While 'Barbara' Keeps Dancing

By JOAN CURTIN

It is difficult to refer to Barbara (legally Peter) LaFurge as "he." In fact, just about no way.

Barbara is a trans-sexual topless dancer who is appearing at the Red Velvet, Smithtown's only topless bar. She is six feet tall, weighs 135 pounds, has medium-length, wavy, dark blond hair, and a most convincing feminine figure and complexion. She appears quiet and retiring. Barbara says she has been in the process of becoming a woman for the past four years, and hopes to complete it by this fall.

For the past few years, Barbara has been dancing in just about every topless lounge on Long Island. She says that most of the lounge owners, and customers have not known that she is still a male. Her agents, the A & P Talent Agency, New York, do know, and Barbara says it presently has about 10 other trans-sexual dancers working on Long Island. Barbara, in fact, danced at the Red Velvet incognito, when it was Sophie's, a few years back.

The notoriety Barbara achieved when she was arrested for topless dancing in Smithtown two weeks ago has almost totally destroyed her career as a dancer, she says.

Didn't Barbara know that when she agreed to dance topless in Smithtown that she would be arrested and exposed? "Yes," she said, "but I didn't think it would be this bad." What has been the hassle? "Right now,

trying to correct all the interviews I've had. So many of them have been misleading. It's all done a lot of damage to my personal and public life. So much information has been misinterpreted.

Barbara LaFurge, who is 23 years old, began her dancing career as a female eight years ago. When she was 15, she made the decision that she wanted to become a woman ("because it just felt natural"), and ran away from home (Dobbs Ferry, N. Y.) to do so. She found employment as a go-go dancer in New Jersey clubs. Later on, she began her sex change and started topless dancing. Her eventual ambition, she says, is to go back to school, study psychology, get married and settle down. Anonymity is beginning to look good to her.

Since the publicity hasn't really done her any good, can she find any justification for recent events? "I've some very mixed feelings about it all," Barbara replied. "It's been good for trans-sexuals and topless dancing. But for me, it hasn't been too good a move." As to what she thinks of Smithtown and its anti-topless ordinance, Barbara says she really doesn't know too much about the town, but she obviously is against the anti-topless law and that's why she went through with the initial staged performance and arrest. "Why shouldn't we be allowed to dance topless? It's a job. It doesn't hurt anybody."

Barbara said she has many friends, both male and female, in the business

(topless dancing), and all they want to do is make a living.

Just lately, Barbara has gone back to living at home with her family. She is one of five children (two brothers and two sisters). She says she is accepted almost everywhere now.

As the jukebox thundered loudly at the Red Velvet, Barbara winced and commented, "I have to listen to that all day." And that brought to mind an old saying, "What's a nice girl like you doing in a place like this?"

Making a living.



barbara la furge

## And The Red Velvet's Clientele Keeps Watching

The Red Velvet is a small, down-at-the-heels bar in Lake Ronkonkoma on the edge of Smithtown. It is painted yellow on the outside, has no visible sign bearing its name, and apparently gets its name from the red-flocked wallpaper on the inside. A protruding sign outside advertises topless dancers. Inside, a house rule sign states that only patrons over 21 years of age will be served.

Conversation among its patrons is cozy and friendly. The bar has one topless dancer at the moment, Barbara LaFurge, a trans-sexual.

Three weeks ago, James Francione was hired by the owner, John Klein (no relation to the County Executive), to come in and test Smithtown's anti-topless law for him. Klein, according to Francione, works for the New York City Sanitation Department, and didn't want to run the risk of being arrested himself. Francione has been in the topless-dancer bar business locally, both in and out of Smithtown, for seven years. He has his own topless bar down the road, outside Smithtown limits.

Two weeks ago, Barbara and Francione were arrested in front of television cameras and press photographers. The charges have since been dropped against Barbara, because Smithtown's anti-topless law states that only females cannot dance topless, and Barbara is still legally a male. Several days prior to this staged arrest, Francione was booked with two female topless dancers who had appeared at the Red Velvet. Last Thursday, the dancers pleaded "Not guilty," at their arraignment and will go to trial at the end of this month.

Business, according to Francione, has picked up since the Red Velvet acquired a dancer. Jeannie, one of the lounge's barmaids, tended to agree with him. She said they still get their regulars plus some new customers now that Barbara is on the scene.

"If men are willing to pay extra for a drink because there's a topless dancer here, why not?" Jeannie asked. "Personally, I think they're crazy. I think married men are better off in a topless bar, though, than in a singles bar. Nothing goes on here. But in a singles bar, that's where they can really get into trouble."

A Red Velvet customer, Ed Burns, who works in a delicatessen in St. James, said he doesn't see anything wrong with topless dancing. "If Barbara can do it, why can't a woman? It's good for business in Smithtown. And good business helps pay taxes."

Another customer, who wished to remain anonymous because he said he didn't want his wife or his "respectable" friends to know he was there, commented, "I've been a resident of Smithtown for 26 years. I'm a beer truck driver, and I'd like to see this place go topless all the way, because right now, it pays. Then I'd like to get this account." He also thought topless dancing was about to phase out pretty soon. "It's been a gimmick, but I really think it's on its way out."

"And something else you can put in your story," from Mr. Anonymous. "What really turns me on are those girls out in East Hampton in the summer in their bikinis. I really like something that leaves a little to the imagination."

—Joan Curtin





43a



**Application for Convening of Three-Judge Court.**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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[S A M E T I T L E]

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Defendants, Paul J. Fitzpatrick and Vincent J. Trimarco, upon the affidavit of Paul J. Fitzpatrick, sworn to the 8th day of April, 1974, and the memorandum of law served the 8th day of April, 1974, and the oral application made before the Hon. Walter Bruchhausen on the 9th day of April, 1974, by the undersigned, hereby make application for a hearing of this cause before a Three-Judge District Court as required by Section 2325, Title 28, United States Code, and requests that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to Section 2284, Title 28, United States Code, of presentation of plaintiff's complaint in order that necessary designation for said Court may be made.

Dated: Commack, New York, April 10, 1974.

HOWARD E. PACHMAN  
Special Counsel to the  
Town of Smithtown

**Amended Answer of Paul J. Fitzpatrick and  
Vincent J. Trimarco.**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Case # 74-C-476

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GAJON BAR & GRILL, INC. (a body corporate of the State of  
New York), 309 Smithtown Boulevard, Lake Ron-  
konkoma, L. I., New York, et ano.,

Plaintiffs,

*against*

EUGENE KELLY, individually and in his capacity as Police  
Commissioner of the County of Suffolk, State of New  
York, Veterans Memorial Highway, Hauppauge, New  
York, et al.,

Defendants.

---

Defendants, Paul J. Fitzpatrick and Vincent J.  
Trimarco, by Howard E. Pachman, their special counsel,  
submit this amended answer to the complaint herein and  
allege:

AS TO COUNT I OF THE COMPLAINT

FIRST: Deny each and every allegation contained in  
Paragraphs "1", "9", "10", "11", "12", "13", "16",  
"19", "20", "21", "22", "23", "24", "25", "26", "27",  
"28", "29", "30", "31", "32" and "33".

SECOND: Deny knowledge or information sufficient to  
form a belief as to each and every allegation contained in  
Paragraphs "2", "3", "14", "15", "17" and "18".



*Amended Answer of Paul J. Fitzpatrick and  
Vincent J. Trimarco.*

AS TO COUNT II OF THE COMPLAINT

THIRD: Repeat, reiterate and reallege each and every denial contained in Paragraphs "First" and "Second" of this amended Answer with the same force and effect as if fully set forth herein.

FOURTH: Deny each and every allegation contained in Paragraphs "2", "3", "4", "5" and "6".

AS TO COUNT III OF THE COMPLAINT

FIFTH: Repeat, reiterate and reallege each and every denial contained in Paragraphs "First", "Second", "Third" and "Fourth" of this amended Answer with the same force and effect as if fully set forth herein.

SIXTH: Deny each and every allegation contained in Paragraphs "2" and "3".

AS AND FOR A FIRST AFFIRMATIVE AND DISTINCT DEFENSE

SEVENTH: The complaint fails to state a claim under which plaintiffs would be entitled to relief.

AS AND FOR A SECOND AFFIRMATIVE AND DISTINCT DEFENSE

EIGHTH: The plaintiffs have failed to exhaust their State remedies.

AS AND FOR A THIRD AFFIRMATIVE AND DISTINCT DEFENSE

NINTH: The Court should not assume jurisdiction to any of the two (2) counts on the ground that the doctrines of

*Amended Answer of Paul J. Fitzpatrick and  
Vincent J. Trimarco.*

equity, comity and federalism, as enunciated in the trilogy of *Younger-Samuels* and *Steffel*, are applicable.<sup>1</sup>

WHEREFORE, defendants demand judgment dismissing the complaint, together with appropriate costs and disbursements and such other relief as to this Court will seem just and proper.

Dated: Commack, New York, April 24, 1974.

HOWARD E. PACHMAN  
Special Counsel for Defendants  
Paul J. Fitzpatrick and  
Vincent J. Trimarco

(Verified)

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<sup>1</sup> *Younger v. Harris*, 401 U.S. 37;  
*Samuels v. Mackell*, 401 U.S. 66;  
*Steffel v. Thompson*, — U.S. —, 42 L.W. 4357.



**Verified Answer of Eugene Kelley.**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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[S A M E T I T L E]

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Defendants, Eugene Kelley (sued herein as Eugene Kelly), Robert Hoss and Emil Ortolani, for their answer to the complaint, by George W. Percy, Jr., Suffolk County Attorney, Patrick A. Sweeney, of Counsel, allege upon information and belief:

COUNT I

1. Denies the allegations contained in Paragraphs "1", "10", "11", "19", "20", "21", "22", "23", "24", "25", "26", "27", "28", "29", "30", "31", "32" and "33".
2. As to Paragraph "9", denies leaving the official ordinance referred to in said paragraph for the court to take judicial notice at the date of trial.
3. Denies knowledge or information sufficient to form a belief as to the paragraphs of the complaint numbered "2", "3", "5", "8", "12", "13", and "16".
4. As to the paragraphs numbered "14", "15" and "17", denies leaving questions of law to the court as to the official records of the District Court of Suffolk County.

COUNT II

5. As to Paragraph "1" of Count II of the complaint, defendants repeat and reallege each and every admission

*Verified Answer of Eugene Kelley.*

and denial as to each and every allegation contained in paragraphs "1-33" of Count I, with the same force and effect as if fully set forth herein.

6. Denies the allegations contained in paragraphs "2", "3", "4", "5" and "6".

COUNT III

7. As to Paragraph "1" of Count III of the complaint, defendants repeat and reallege each and every admission and denial as to each and every allegation contained in paragraphs "1-33" of Count I and "1-6" of Count II with the same force and effect as if fully set forth herein.

8. Denies the allegations contained in Paragraphs "2" and "3".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANTS,  
KELLEY, HOSS AND ORTOLANI, ALLEGE:

9. The complaint fails to state a claim under which plaintiffs would be entitled to relief.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, DEFENDANTS,  
KELLEY, HOSS AND ORTOLANI, ALLEGE:

10. The plaintiffs have failed to exhaust their state remedies.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, DEFENDANTS,  
KELLEY, HOSS AND ORTOLANI, ALLEGE:

11. As there are State actions pending involving the identical facts outlined in plaintiffs' complaint, the court



*Verified Answer of Eugene Kelley.*

lacks jurisdiction of the instant case or, in the alternative, the court should decline jurisdiction based upon the doctrine of comity between the State and Federal Courts.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, DEFENDANTS,  
KELLEY, HOSS AND ORTOLANI, ALLEGE:

12. That plaintiffs have failed to comply with the provisions of Sections 50(i) and 50(e) of the General Municipal Law in that no notice of claim was served nor has there been any compliance with said statutes.

WHEREFORE, defendants Eugene Kelley, Robert Hoss and Emil Ortolani, demand judgment dismissing the complaint together with the costs and disbursements of this proceeding.

Dated: Northport, New York, May 1, 1974.

GEORGE W. PERCY, JR.  
Suffolk County Attorney  
PATRICK A. SWEENEY,  
Of Counsel  
Attorney for Defendants,  
Kelley, Hoss and Ortolani

(Verified.)

**Opinion-Decision of Bruchhausen, D.J.**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 74 C 476

May 2, 1974

---

GAJON BAR & GRILL, INC. and JAMES FRANCIONE,

Plaintiffs,

*against*

EUGENE KELLY, individually and in his capacity as Police Commissioner of the County of Suffolk, State of New York; PAUL J. FITZPATRICK, individually and as Supervisor of the Town of Smithtown; VINCENT J. TRIMARCO, individually and as Town Attorney of the Town of Smithtown; ROBERT HOSS, individually and as a member of the Suffolk County Police Department; and EMIL ORTOLANI, individually and as a member of the Suffolk County Police Department,

Defendants.

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**Appearances:**

BELLI, SARISOHN, CREDITOR, CARNER,  
THIERMAN & STEINDLER, Esqs.  
Attorneys for Plaintiffs

GEORGE W. PERCY, JR., Esq.  
County Attorney of Suffolk County  
Attorney for Defendants Eugene Kelly,  
Robert Hoss and Emil Ortolani



*Opinion-Decision of Bruchhausen, D.J.*

HOWARD E. PACHMAN, Esq.  
Attorney for Town of Smithtown  
and Defendants Paul J. Fitzpatrick  
and Vincent J. Trimarco

BRUCHHAUSEN, D. J.

The plaintiffs own and manage the Gajon Bar and Grill, Inc., located in Lake Ronkonkoma, New York, and provide for their adult customers live stage entertainment in the form of topless dancing.

The Legislature of the State of New York, amended Sections 245.01 and 245.02 of its Penal Law, effective September 1, 1970, adding:

"Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting the exposure of a female substantially as herein defined in a public place, at any time, whether or not such female is entertaining or performing in a play, exhibition, show or entertainment."

This amendment authorized local governments to adopt laws in an effort to regulate topless entertainment.

Thereafter, on January 23, 1973, the Smithtown Town Board adopted Local Law No. 1—1973, a Local Law to regulate entertainment in public places. The entertainment regulations are attached as Appendix A.

The plaintiffs seek injunctive and declaratory relief, pursuant to 28 U.S.C.A. § 2201, et seq., against the enforcement of the Local Law, charging a violation of their civil rights, pursuant to 42 U.S.C.A. § 1983.

The moving affidavits indicate that prior to topless entertainment, business was unprofitable. Subsequent to this entertainment, business became profitable, and the co-plaintiff James Francione was hired to manage the business. The dancers are employed solely to provide topless entertain-

*Opinion-Decision of Bruchhausen, D.J.*

ment on stage before an adult clientele. The corporate plaintiff alleges that the Supervisor of Smithtown in public releases stated that he did not intend to permit this form of entertainment. The corporate plaintiff, fearful of prosecution, has ceased to provide this form of entertainment. As a result thereof, substantial monetary losses are being sustained by both plaintiffs.

James Francione alleges that he was arrested on two occasions under a similar Local Law in 1972. Those charges were dismissed because the Local Law was enacted prior to the enabling act permitting towns to adopt Local Laws, regulating topless entertainment. Thereafter, on March 16, 1974, the plaintiff, Francione, was arrested twice for violating the topless entertainment Local Law. On March 19, 1974, the movant was again arrested along with a dancer for violation of this law, but later released, when it was determined that the dancer, La Furge, was a male. Subsequent to this March 19 arrest, the town supervisor was quoted as saying, in essence, that we have no interest in being the topless capital of the county, and was pleased with the arrests made in connection with this Local Law. In substance, there have been five arrests for violation of the present law, that the supervisor intends to stop topless entertainment, and that there is a real fear of continued prosecution under the present Local Law.

The opposing affirmation of Patrick A. Sweeney asserts that the police officers, named in the suit, were merely doing their job in enforcing the law; that it is not the duty of a policeman to question the constitutionality of any ordinance or law, and finally there may be many reasons why the establishment has lost business without topless entertainment.

The affidavit of Paul J. Fitzpatrick does not add any new matter in opposition to this suit.

Thereafter, the special counsel to the Town of Smithtown applied for the convening of a three-judge court to determine the constitutionality of this law.



*Opinion-Decision of Bruchhausen, D.J.*

At the outset, the Local Law, involved, is not of state-wide application, and, therefore, the statutory requirement for consideration by a three-judge court, 28 U.S.C.A. §§ 2281, 2284, is inapplicable. *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973).

The Court holds that the Local Law in the case at bar is patently unconstitutional.

It is conceded that the only plaintiff presently under criminal charges is James Francione. In *Steffel v. Thompson*, decided March 19, 1974, 42 L.W. 4357, the Court held at page 4358:

"When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), held, respectfully, that, unless bad faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. This case presents the important question reserved in *Samuels v. Mackell*, 401 U.S. at 73-74, whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending, and a showing of bad faith enforcement or other special circumstances has not been made."

Further, the Court held in part at page 4360:

"When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered inde-

*Opinion-Decision of Bruchhausen, D.J.*

pendently of a request for injunctive relief. Here, the Court of Appeals held that, because injunctive relief would not be appropriate since petitioner failed to demonstrate irreparable injury—a traditional prerequisite to injunctive relief, e.g., *Dombrowski v. Pfister*, *supra*—, it followed that declaratory relief was also inappropriate. \* \* \* '[W]hen no state prosecution is pending and the only question is whether declaratory relief is appropriate [...] . . . the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.' *Perez v. Ledesma*, 401 U.S. 82, 104 (1971) (separate opinion)."

The Court finally concluded at page 4364:

"We therefore hold that, regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied."

In the case at bar there is a pending state criminal proceeding against James Francione, the manager of the corporate plaintiff. There is no pending state proceeding against the corporate plaintiff. The affidavit of John Klein, its president, states in part on page 2 thereof:

"The substantial curtailment of business resulting from compliance with the Local Law is likely to result in a failure of the business.



*Opinion-Decision of Bruchhausen, D.J.*

"As a result of the imminence of prosecution and the reported statements of the Supervisor of the Town of Smithtown that he does not intend to permit topless entertainment in the Town of Smithtown, I am fearful of prosecution under the Local Law and have been forced to cease the use of female topless dancers."

It is apparent that the corporate federal plaintiff has been complying with the Local Law, in order not to subject itself to state criminal proceedings.

There is no indication as to when a final determination will be made by the Suffolk County District Court concerning the charges against James Francione.

In *Thomas v. Heffernan*, 473 F.2d 478 (2d Cir., 1973), the Court held in part at page 483:

"Furthermore persuasive policy considerations suggest that the pendency of criminal proceedings in the state courts against others should not prevent the appellee from obtaining federal anticipatory relief. See generally *Perez v. Ledesma*, 401 U.S. 82, 120-122, 91 S. Ct. 674, 27 L.Ed. 701 (1971) (separate opinions). . . .

"Additionally, federal court interference with state administration of its criminal law, the basic comity concern underlying the Younger group of cases, is minimized when no state prosecution is pending against the federal plaintiff. The state has not yet committed its criminal justice resources to the prosecution of the particular case and the allegedly 'chilled' individual should be able to choose a federal forum for protection of his constitutional rights. . . . A choice of a federal forum to vindicate first amendment rights is entitled to significant weight in determining the availability of anticipatory relief. See *Ex parte Young*, 209 U.S. 123, 165, 28 S. Ct. 441, 52 L. Ed. 714

*Opinion-Decision of Bruchhausen, D.J.*

(1908); see also *Wisconsin v. Constantineau*, 400 U.S. 433, 437-439, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971)."

The Court is persuaded that an actual controversy is presented as required by the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. A substantial curtailment of business, the cessation of topless dancing due to the threat of state prosecution overcomes any justiciable barrier. The manager was subject to five separate proceedings instituted by the County in violation of its Local Law. There is no doubt that the owner and employer of the manager is under a real threat of criminal prosecution if the Local Law is not heeded.

The Local Law prohibits any female from appearing in "any place" with uncovered breasts to which the public has a right to resort. A public show includes actors, dancers, or other performers, employees or other persons who appear in person before spectators or customers. This law is so broad that it "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." *Thornhill v. Alabama*, 310 U.S. 88, 97. There is no limit to the interpretation of the term "any place." As was stated in *Salem Inn, Inc. v. Frank*, 364 F. Supp. 478 (1973), Judge Bartels held in part at page 483:

"Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance. The ordinance would also prohibit the production of the musical performance 'Hair,' which included a female topless performer but was protected against prosecution under a Massachusetts obscenity statute. . . . We, therefore, believe that on its face as drawn the ordinance is constitutionally invalid as an infringement upon plaintiffs' First Amendment freedoms."



*Opinion-Decision of Bruchhausen, D.J.*

The law is clear that a state court proceeding against one federal plaintiff does not bar the other plaintiffs from anticipatory relief. *Thomas v. Heffernan* and *Steffel v. Thompson*, *supra*. However, it would be anomalous not to extend it to all federal plaintiffs. It is well settled that federal courts will not interfere except in "exceptional and extremely limited circumstances," from intervention by way of either injunctive or declaratory relief in any existing state criminal prosecutions. The extraordinary circumstances may be found in harassment and bad faith in enforcing the law or where irreparable injury might result from the enforcement of the law that is "patently and flagrantly unconstitutional on its face." *Younger v. Harris*, *supra*. In the case at bar the number of arrests, the threat of future arrests under the Local Law and the contention of financial ruin against the federal plaintiffs as a result of patently unconstitutional law would bring this case within the exception permitting federal intervention. The conclusion here is inescapable that there is more than a mere "chilling" effect upon the First Amendment rights in the enforcement of this Local Law.

The substance of this anti-topless law is substantially similar to the one that was stricken by Judge Bartels of this court in *Salem Inn, Inc. v. Frank*, *supra*.

The Court concludes that the Local Law 1—1973 is on its face unconstitutional and that the defendants, each and everyone of them are hereby enjoined from prosecuting the plaintiffs for any violation of said law of the Town of Smithtown, or in any way interfering with the activities which may be prohibited by said Local Law.

Copies hereof are being forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN  
Senior U. S. D. J.

**Notice of Appeal.**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Case No. 74-C-476

---

GAJON BAR & GRILL, INC., and JAMES FRANCIONE,  
Plaintiffs,  
*against*

EUGENE KELLY, individually and in his capacity as Police Commissioner of the County of Suffolk, State of New York; PAUL J. FITZPATRICK, individually and as Supervisor of the Town of Smithtown; VINCENT J. TRIMARCO, individually and as Town Attorney of the Town of Smithtown; ROBERT HOSS, individually and as a member of the Suffolk County Police Department; and EMIL ORTOLANI, individually and as a member of the Suffolk County Police Department,

Defendants.

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Notice is hereby given that Paul J. Fitzpatrick and Vincent J. Trimarco, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the opinion, order and/or judgment of the Hon. Walter Bruchhausen, Senior United States District Judge, dated May 2, 1974, which concluded that Local Law 1—1973 is on its face unconstitutional and that the defendants, each and everyone of them are hereby enjoined from prosecuting the plaintiffs for any violation



60a

*Notice of Appeal.*

of said law of the Town of Smithtown, or in any way interfering with the activities which may be prohibited by said Local Law.

Dated: Commack, New York, May 24, 1974.

HOWARD E. PACHMAN  
Special Counsel to defendants  
Paul J. Fitzpatrick and  
Vincent J. Trimarco

(56533)



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

GAJON BAR & GRILL, INC. and JAMES FRANCIONE,  
Plaintiffs-Appellees,  
against

EUGENE KELLY, individually, etc.,  
Defendant,  
and

PAUL J. FITZPATRICK, etc.;  
VINCENT J. TRIMARCO, etc.,  
Defendants-Appellants,  
and  
ROBERT HOSS, etc., et al.,  
Defendants.

State of New York,  
County of New York,  
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes  
and says that he is over the age of 18 years. That on the 4th  
day of September, 1974, he served two copies of the  
Joint Appendix on  
Belli, Sarisohn, Creditor, Carner, Thierman & Steindler

the attorney s for the Plaintiffs-Appellees  
by depositing the same, properly enclosed in a securely sealed  
post-paid wrapper, in a Branch Post Office regularly maintained  
by the Government of the United States at 90 Church Street, Borough  
of Manhattan, City of New York, directed to said attorney s at  
No. 1020 East Jericho Turnpike, Commack ( ) N. Y.,  
that being the address designated by t h em for that purpose upon  
the preceding papers in this action.

*Irving Lightman*

Sworn to before me this

4th day of September, 1974

*Courtney J. Brown*

COURTNEY J. BROWN  
Notary Public, State of New York  
No. 31-5472920  
Qualified in New York County  
Commission Expires March 30, 1976

